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10/815,408	04/01/2004	Patricia L. Gardner	02-014-01 (IDRF118)	7986

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EXAMINER

EDELL, JOSEPH F

ART UNIT	PAPER NUMBER
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3636

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GROUP 3600

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/815,408
Filing Date: April 01, 2004
Appellant(s): GARDNER ET AL.

S. Ormiston
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 09 March 2006 appealing from the Office action mailed 07 October 2005.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,329,934	BOWMAN	7-1994
2,700,381	POWELL	1-1955

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-4 are rejected under 35 U.S.C. § 102(b) as being anticipated by Bowman. This rejection is set forth in a prior Office Action, mailed 07 October 2005. Claims 5-11 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Bowman in view of Powell. This rejection is set forth in the prior Office Action, mailed 07 October 2005.

(10) Response to Argument

Response to Ground No. 1 of Appeal Brief:

Appellant's first argument is Bowman does not teach the limitation of claim 1 because the infant holder of Bowman lacks a recess configured to support an infant's

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torso. Initially, please note that Examiner reasonably interprets a recess as an indentation or cleft, as defined in *Merriam-Webster's Collegiate Dictionary, Tenth Edition*. Bowman teaches a body having an indentation formed between the circular head cushion 60 and lower torso support block 50 for supporting the infant lying on the torso pad 40. See Diagram A below for a designation of the recess in the infant holder of Bowman. Therefore, Bowman teaches a body having a recess configured to support the infant's torso and legs.

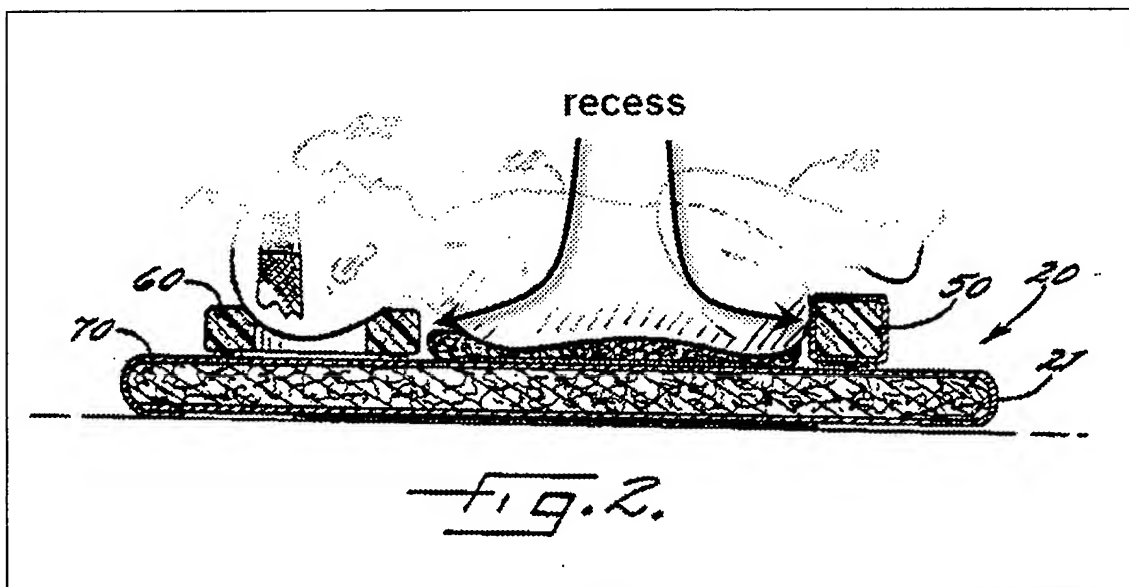


Diagram A - Annotated Figure 2 of Bowman

Additionally, Bowman teaches that the infant holder's body has a torso pad 40 of woven synthetic material that forms recesses near the shoulders and lower torso of the infant to support the infant when lying on his/her back. See Diagram B below for a designation of the recesses in the infant holder of Bowman. While these recesses in

the torso pad are formed from the weight of the user, the claim 1 limitation is met because nothing in the claim requires that the body have pre-shaped recesses formed in the infant holder. So long as the recesses of the torso pad are configured to support the infant's torso and legs, Bowman teaches the claim 1 limitation.

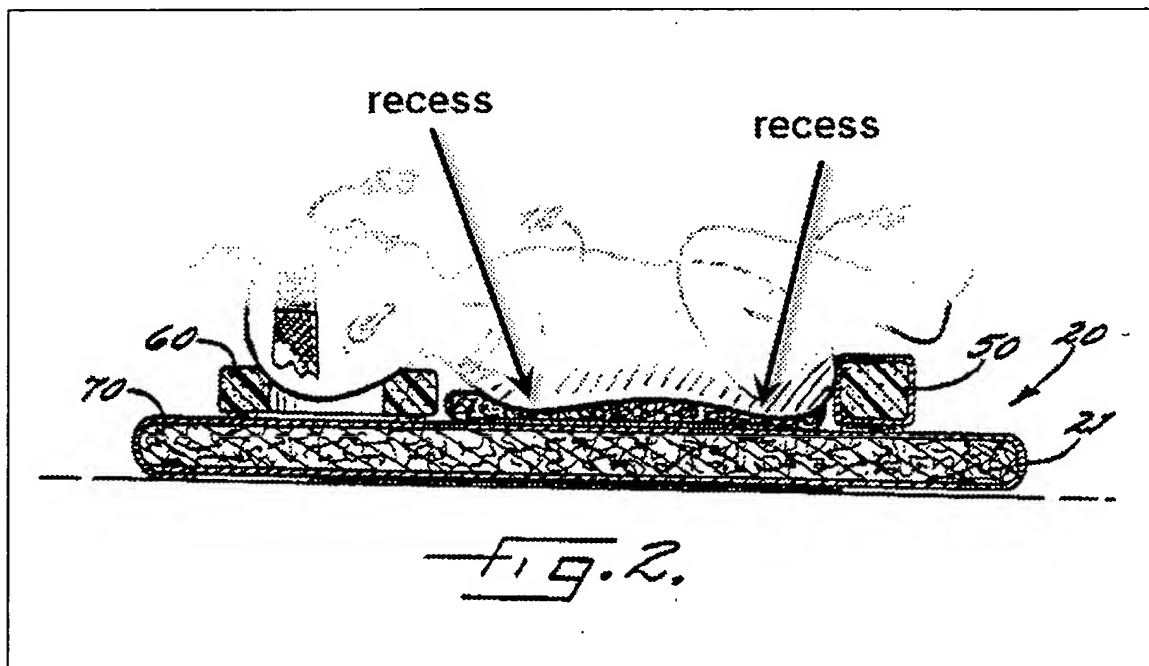


Diagram B - Annotated Figure 2 of Bowman

Next, Appellant argues that the recess of the torso pad of Bowman is not configured to support the infant's legs. However, this argument is not persuasive for two reasons:

Firstly, the inventive concept of Bowman is toward an infant holder restraining the infant in a spread eagle position for various medical procedures wherein the infant's head is supported between the recess of cushion 60 and the infant's shoulders, torso,

and legs are supported between the recess of cushion 60 and block 50. The torso pad clearly supports the infant's torso and must inherently support the infant's legs as the infant's legs are attached to the infant's torso. See Figure 2 of Bowman showing that the infant's lower leg portion actually contacts the block 50 to prevent the infant from extending his/her legs downwardly during the medical procedure. Moreover, Figure 1 of Bowman shows that the infant's legs are supported by the recess formed in the torso pad 40 when the infant is lying in the infant holder.

Secondly, the supporting of the infant's torso and legs is intended use of the claimed invention that does not patentably distinguish the claimed invention from Bowman. Claim 1 merely recites the structural limitations of an infant holder having a body including a recess. The configuration of the recess to support an infant's torso and legs in the recited angular orientations is merely intended use. The infant holder of Bowman is capable of performing the intended use, and, therefore, it meets the claim. For these two reasons, Bowman teaches a recess configured to support an infant's torso and legs.

With respect to claim 1, Appellant lastly argues that the infant holder of the instant application has features to support the infant's legs in a natural position, which are not taught in Bowman as evidenced by Bowman use of straps to hold the infant's legs. However, both the application and Bowman are toward supporting an infant in a spread-eagle position. Also, the instant application teaches the use of straps 42 (Fig. 2) to restrain the infant's legs. Therefore, Bowman teaches the same features to support the infant's legs that are recited or implied in claim 1.

Please note that Appellant has not set forth any arguments regarding the angle ranges of claim 1. It is presumed that, upon finding that Bowman teaches an infant holder having a recess configured to support an infant's torso and legs, the angle ranges are anticipated by Bowman.

Response to Ground No. 2 of Appeal Brief:

Appellant's sole argument toward dependent claim 1 is that Bowman does not teach the limitation of the base claim 1. See the above arguments toward the rejection of claim 1 as being anticipated by Bowman.

With respect to independent claims 6 and 10, Appellant argues that the combination of Bowman in view of Powell does not teach a second recess for supporting the infant's legs that extends away from the first portion at an angle in the range of 70° to 120° and inclines at an angle in the range of 20° to 50° because the leg recesses of Powell are not oriented within these ranges. However, this is not persuasive for two reasons:

Firstly, the obviousness of the infant holder recited in claims 6 and 10 cannot be evaluated by attacking the references individually when the rejection is based on the combination of the references. Figures 1 and 2 of Bowman clearly show that the spread-eagle positioning of the infant's legs is oriented to be angled 110° relative to downwardly extending position and are inclined 30° from a flat position. Powell teaches the use of a torso recess and leg recesses allows for the retention of a removable lining fluid-absorbent material to maintain a sanitary surgical environment. Bowman teaches

the orientation of the infant's leg within the recited ranges of claims 6 and 10 wherein Powell teaches modifying the recess of Bowman such that it includes individual leg recesses for supporting a removable lining to maintain a sanitary surgical environment. Therefore, the 35 U.S.C. § 103(a) rejection of claims 6 and 10 as being unpatentable over Bowman in view of Powell is proper. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Secondly, modifying the leg recesses of Bowman in view of Powell to extend away from the torso portion at an angle in the range of 70° to 120° and inclining relative to the first portion at an angle in the range of 20° to 50° would have been an obvious matter of design choice. Even though angle ranges of the leg recesses are not specifically recited in Bowman or Powell, modifying the angle range would have been obvious at the time of Appellant's application because of the precedent established by *In re Aller*, 105 USPQ 233 (CCPA 1955) which states that use of preferred materials and optimum or workable ranges discovered by routine experimentation is ordinarily within the skill of the art. Further, it would have been an obvious matter of design choice to modify the angle range, since the Appellant has not disclosed that having the specific angle ranges solve any stated problem or is for any particular purpose and it appears that the infant holder of Bowman, as modified, would perform equally well with the second recesses being at any reasonable angle. Appellant has not set forth in the specification that the angle ranges are critical to the operation of the infant holder, or that the angle ranges produce unexpected results. On page 2, paragraph 10 of the

specification, Appellant states that angle ranges are preferred to mimic the natural flexure in the hips of most infants. However, Appellant does not state that these angle ranges are critical to the successful operation of the infant holder. Moreover, the breadth of the ranges also suggest that the recited claim ranges are not critical to the operation of the infant holder. Presumably, other angle ranges would provide support for the infant's torso and legs, which may be outside this natural flexure orientation. Therefore, it would have been an obvious matter of design choice to modify the infant holder of Bowman in view of Powell at the time of the invention was made.

Response to Ground No. 3 of Appeal Brief:

Appellant argues that Bowman, alone or in combination, fails to teach a torso recess inclining relative to the horizontal at an angle in the range of 5° to 20°. However, the recess of Bowman is utilized to orient the infant in a spread-eagle position to orient the infant's torso such that the lower torso is angled relative to the infant holder. See Diagram C below for the teaching that the torso recess inclines relative to the horizontal at an angle in the range of 5° to 20°. Therefore, Bowman teaches a base having a torso recess inclining at an angle in the range of 5° to 20°.

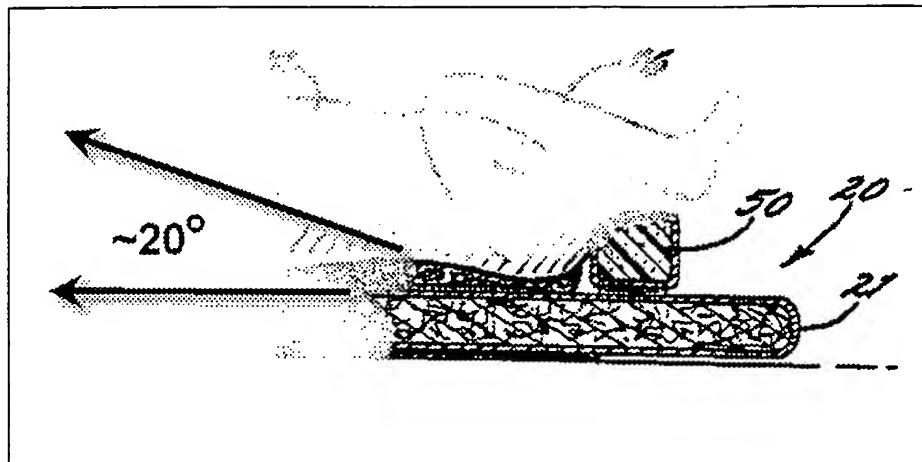


Diagram C- Annotated Figure 2 of Bowman

In addition, modifying the torso recess of Bowman in view of Powell to incline relative to the horizontal at an angle in the range of 5° to 20° would have been an obvious matter of design choice. Even though angle ranges of the leg recesses are not specifically recited in Bowman or Powell, modifying the angle range would have been obvious at the time of Appellant's application because of the precedent established by *In re Aller*, 105 USPQ 233 (CCPA 1955) which states that use of preferred materials and optimum or workable ranges discovered by routine experimentation is ordinarily within the skill of the art. Further, it would have been an obvious matter of design choice to modify the angle range, since the Appellant has not disclosed that having the specific angle ranges solve any stated problem or is for any particular purpose and it appears that the infant holder of Bowman, as modified, would perform equally well with the torso being oriented at any reasonable angle. Appellant has not set forth in the specification that the angle ranges are critical to the operation of the infant holder, or that the angle ranges produce unexpected results. On page 1, paragraph 7 of the

specification, Appellant states that elevating the infant's head helps prevent aspiration. However, Appellant has not stated that inclining the entire torso recess is critical to this concern. Presumably, the elevation of the infant's head as shown in Figure 2 of Bowman via the cushion 60 provides the necessary elevation. Therefore, it would have been an obvious matter of design choice to modify the infant holder of Bowman in view of Powell at the time of the invention was made to make the infant's head elevation result from an inclination in the torso recess.

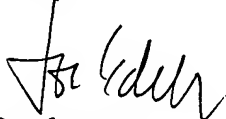
(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


Joseph Edell



Conferees:

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